No. 20068

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JIM GARVISON, et al.,

Appellants,

vs.

NORMAN A. JENSON,

Appellee.

BRIEF OF AMICI CURIAE, THE TRUSTEES OF MOTION PICTURE INDUSTRY PENSION PLAN; I.A.T.S.E. BASIC CRAFTS-GUILDS — HOLLYWOOD PRODUCERS HEALTH AND WELFARE FUND FOR THE EMPLOYEES OF THE MOTION PICTURE AND ALLIED INDUSTRIES; SCREEN ACTORS GUILD — PRODUCERS PENSION PLAN; SCREEN ACTORS GUILD — PRODUCERS WELFARE PLAN; DIRECTORS GUILD OF AMERICA — PRODUCER PENSION PLAN; AND PRODUCER-WRITERS GUILD OF AMERICA PENSION PLAN; IN SUPPORT OF APPELLANTS.

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PRELIMINARY STATEMENT

This brief is limited primarily to the following point urged by *amici curiae:*

Since subsection (c)(5) of Section 302 of the Labor Management Relations Act, as amended, is an exception to a criminal statute, proper application of the rules of statutory construction requires that the

terms of the exception be construed liberally so as to resolve any ambiguities or uncertainties therein in favor of inclusion within the exception, particularly where, as in the instant case, to do so would in no way defeat the obvious purposes of Congress in enacting Section 302.

This Court is being asked to determine the meaning of the words "employees" and "other employers" as used in subsection (c)(5) which is an exception to Section 302 of the Labor Management Relations Act, as amended, 29 U.S.C. §186.* We believe that such words can be defined in appellants favor by resort to the clear meaning of the words as used in the Act, keeping in mind the general rule of statutory construction that where the same word is used in different parts of a statute it is to be presumed that, in the absence of anything indicating a contrary intent, the word is used in the same sense throughout. *United States v. Gertz,* 249 F.2d 662, 665 (9th Cir. 1957); *Schooler v. United States,* 231 F.2d 560, 563 (8th Cir. 1956).

Thus, for example, the word "employer" is defined in Section 2(2) of the Act as including a labor organization "when acting as an employer." The Supreme Court has held that the word "employer" as used in Section 9 of the Act includes a labor organization so that its employees may exercise their Section 7 rights to bargain collectively. *Office Employees Union v. N.L.R.B.,* 353 U.S. 313 (1957). There is no indication whatever in

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* This statute will hereinafter be referred to as "the Act."

Section 302 that the word "employer" as used in Section 302(c)(5) was intended to be different from its definition and use in other sections of the Act wherein unions are included when acting as employers of their employees. Furthermore, there is no provision in Section 302 which indicates that the trust itself cannot be an employer when acting with respect to its employees. Our position is fully supported by the decisions of the Eighth Circuit Court of Appeals in *Blassie v. The Kroger Company*, No. 17598, ... F.2d ..... (8th Cir. April 23, 1965) 59 LRRM 2034 and *Local No. 688, International Brotherhood of Teamsters v. Townsend*, No. 17710, ... F.2d ..... (8th Cir., April 23, 1965) 59 LRRM 2048.

Similarly, we think that the word "employees," which is broadly defined in Section 2(3) of the Act as including "any employees," necessarily includes former employees and retired employees. That such an interpretation is required is, we think, made clear by the fact that Section 302(c)(5)(A) and (6) implicitly acknowledge the fact that the word "employees" as used in the opening sentence of subclause (5) is not limited to actively working employees. Thus, an employee receiving such benefits as severance pay, unemployment benefits or disability benefits is not an actively working employee, but is a former employee and is nevertheless clearly within the term "employees" as used in Section 302, and the statute does not set forth any limitation with respect to when such former employee ceased to be actively employed. Moreover, there is no language limiting the term "employee" so as to indicate an intended exclusion of union employees or trust employees.

Here again, the decision of the Eighth Circuit Court of Appeals in *Blassie v. The Kroger Company, supra,* and *Local No. 688, International Brotherhood of Teamsters v. Townsend, supra,* support our conclusions.

We assume, however, for purposes of the argument which follows, that this Court may reach the conclusion that neither the wording of the statute nor its legislative history clearly resolves the issues and that there exists uncertainty and ambiguity in regard to the meaning of the disputed words. Under such circumstances this Court must determine whether it is appropriate to apply a rule of strict or liberal construction in resolving the uncertainty.

The District Court did, of course, give consideration to rules of statutory construction in rendering its decision. This is made particularly evident by Judge Kilkenny's reference to the familiar rule that "exceptions in statutes must be strictly construed and limited to the objects fairly within their terms. . . ." (Opinion of the District Court, p. 5, Record, p. 79) As will be more fully discussed, we believe that the District Court erred in its general approach in that it apparently did not give proper consideration to the character of the statute it was dealing with, which is of a criminal rather than remedial nature.

It is significant to note that in its recent decision in *Blassie v. The Kroger Company*, No. 17598, ... F.2d ..... (8th Cir. April 23, 1965) 59 LRRM 2034, reversing 225 F. Supp. 300 (E.D. Mo. 1964), the Eighth Circuit Court of Appeals expressly adopted a liberal

approach in interpreting the same provision and words of Section 302(c) here in dispute. The court, discussing its "general approach", stated as follows:

> ". . . We recognize that the Supreme Court, in Arroyo v. United States, supra, at p. 424 of 359 U.S., said, as to §302, 'We construe a criminal statute'. See also United States v. Ryan, 350 U.S. 299, 305 (1956). We are aware, too, that in Arroyo a bare majority went on to say that 'a literal construction of this statute does no violence to common sense', that the majority gave the statute a narrow application to the facts there presented, and that the minority stated, p. 433 of 359 U.S., 'Section 302(b) is in all practical effect repealed'. Arroyo, however, was an appeal from the affirmance of a judgment of a conviction in a criminal case.
>
> "We are concerned here, instead, with requested civil relief under §302(e). We do not believe that in this posture the Supreme Court majority in Arroyo would rigidly pursue the strict construction which a criminal statute customarily receives. We would prefer to approach our present task with a construction policy favoring inclusion and benefits where there is no positive statutory language or inference of exclusion, rather than one favoring exclusion and a denial of benefits where there is no positive language of inclusion." (.....F.2d at .....)

We agree with the Eighth Circuit Court of Appeals that a liberal construction is appropriate, as we do with

its decision on the issues here in dispute. In support of the liberal construction adopted by the Eighth Circuit Court of Appeals we present for the Court's consideration an alternative rationale upon which this Court should hold that a liberal statutory construction favoring appellants in the construction of the disputed words contained within the exceptions to Section 302 is in order.

ARGUMENT

SINCE SUBSECTION (c) (5) OF SECTION 302 OF THE LABOR MANAGEMENT RELATIONS ACT, AS AMENDED, IS AN EXCEPTION TO A CRIMINAL STATUTE, PROPER APPLICATION OF THE RULES OF STATUTORY CONSTRUCTION REQUIRES THAT THE TERMS OF THE EXCEPTION BE CONSTRUED LIBERALLY, SO AS TO RESOLVE ANY AMBIGUITIES OR UNCERTAINTIES THEREIN IN FAVOR OF INCLUSION WITHIN THE EXCEPTION, PARTICULARLY WHERE, AS IN THE INSTANT CASE, TO DO SO WOULD IN NO WAY DEFEAT THE OBVIOUS PURPOSES OF CONGRESS IN ENACTING SECTION 302.

A. Exceptions to Criminal Statutes Should be Liberally Construed In Favor Of Inclusion Within The Exception.

Section 302 is a criminal statute. The Supreme Court has so held on two occasions. *Arroyo v. United States,* 359 U.S. 419, 424 (1959); *United States v. Ryan,* 350 U.S. 299, 305 (1956).

It is a fundamental rule of statutory construction that criminal statutes are to be strictly construed.* *Commissioner v. Acker*, 361 U.S. 87, 91 (1959); *Arroyo v. United States*, 359 U.S. 419, 424 (1959); *Federal Communications Commission v. American Broadcasting Co., Inc.*, 347 U.S. 284, 296 (1954); *United States v. Wiltberger*, 5 Wheat 76, 94-95 (1820).

In the course of applying the rule of strict construction of criminal statutes, courts have explained its meaning in various ways. For example, it has often said that the rule requires that ambiguities or uncertainties be interpreted strictly against the state and liberally in favor of the accused. See e.g. *United States v. Resnick*, 299 U.S. 207, 209 (1936); *North American Van Lines v. United States*, 243 F.2d 693, 696 (6th Cir. 1957); *United States v. Thompson*, 202 F. Supp. 503, 507 (N.D. Cal. 1962); *United States v. Pepi*, 198 F. Supp. 226, 229 (D.Del. 1961); *United States v. Wells*, 176 F. Supp. 630, 632 (S.D. Texas 1959). Other courts explaining operation of the rule have held that criminal statutes are to be strictly construed "against the imposition of criminality and in favor of lenity." See e.g. *Ladner v. United States*, 358 U.S. 169 (1958); *Smith v. United States*, 233 F.2d 744, 746 (9th Cir. 1956).

Application of the rule of strict construction to criminal statutes is well illustrated by the language of the Supreme Court in *Ladner v. United States*, 358 U.S. 169 (1958),

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* Strict construction has been defined as ". . . the close and conservative adherence to the literal or textural interpretation." Crawford, *Statutory Construction* (1940) p. 450.

wherein the court was faced with two potentially reasonable but diverse interpretations of the meaning of the term "assault" as used in 18 U.S.C. (1940 ed.) §254:

> "Neither the wording of the statute nor its legislative history points clearly to either meaning. In that circumstance the Court applies a policy of lenity and adopts the less harsh meaning. '[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.' *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222. And in *Bell v. United States,* 349 U.S. 81, 83, the Court expressed this policy as follows: 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.' " (358 U.S. at 177-178)

The generally accepted rationale underlying the rule of strict construction of criminal statutes "in favor of lenity" where uncertainty or ambiguity exists was first enunciated by Chief Justice Marshall in *United States v. Wiltberger,* 5 Wheat 76 (1820) as follows:

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not

the court, which is to define a crime, and ordain its punishment." (5 Wheat at 95)

While the phraseology used by the courts may differ, the underlying interpretation of the rule is at all times consistent — where a criminal statute may mean more than one thing and one meaning would find a violation while the other would not, then the rule of strict construction requires the court to reject the meaning which would find a violation.

The point here urged by *amici curiae* is that the rule of strict construction of criminal statutes requires that an exception to a criminal statute be construed liberally. This point is clearly and fully supported by both the rationale underlying the rule of strict construction for criminal statutes and the cases applying the rule, as heretofore discussed. Obviously, the two corollary rules are consistent. Where uncertainty exists in respect to applicability of a criminal statute to a particular situation then regardless of whether the final stamp of a violation is to be avoided by a strict construction of the general clause, or is to be avoided, as in the statute under consideration, by a liberal construction of an exception thereto, "the ambiguity should be resolved in favor of lenity," i.e., it should be interpreted liberally in favor of inclusion within the exception and strictly against a finding of a violation.

The specific issue of proper construction of exceptions to criminal statutes has not been subject to extensive discussion or analysis. This is perhaps understandable since criminal statutes generally are not written in the

manner of Section 302 which for all practical purposes makes criminality hinge on a failure to comply with the exceptions. However, such authorities as have considered the issues are in full support of *amici curiae's* contention.

For example in *United States v. Slaughter,* 89 F. Supp. 876 (D.C. 1950) the defendant was indicted for violation of 2 U.S.C.A. §267 which requires registration of persons engaged for pay in attempting to influence passage or defeat of legislation by Congress. An exception in the statute makes the general provisions inapplicable to any person appearing before a committee of Congress in support of or in opposition to legislation. In holding that the exception was not limited to witnesses who actually and physically appeared before a committee of Congress to give testimony but that it extended as well to persons, such as the defendant, who had helped prepare statements for witnesses who were to appear before a committee, the court said:

> "The statute is a criminal statute. It must be construed most favorably to the defendant in case of any doubt or ambiguity. To interpret the exception as being limited solely to the person who physically appears before the committee would frequently render nugatory and defeat the apparent intent of Congress . . .
>
> "These activities [preparing statements for witnesses] are clearly within the exception." 89 F. Supp. at 876-77.

A series of state court cases even more explicitly adopts the rule here urged by *amici curiae.*

For example, in *State v. Hill,* 189 Kan. 403, 369 P.2d 365 (1962), the Supreme Court of that State had occasion to comment upon rules of statutory construction applicable to exceptions to criminal laws in the context of an alleged violation of the Sunday sales law. The statute in question first prohibited all sales of "goods, wares or merchandise" but then excepted from its operational scope sales of "drugs or medicines, provisions, or other articles of immediate necessity." The court said:

> ". . . criminal statutes are to be strictly construed and courts should not extend them to embrace acts or conduct not clearly included within their prohibitions [case cited], *and exceptions in penal statutes are to be construed liberally in favor of persons charged with violations of the statutes . . .*" (Emphasis added) 369 P.2d at 372.

Similarly, in *Schuyler v. Southern Pac. Co.,* 37 Utah 591, 109 Pac. 458 (1910), affirmed 227 U.S. 601 (1912), the Supreme Court of that state in the course of interpreting the Hepburn Act (34 Stat. 584; Fed. Supp. 1907 p. 169) which makes it a criminal violation for common carriers to provide free transportation to persons unless within those classes of persons specifically excepted or for persons other than those designated in the exceptions to accept free transportation, held as follows:

> ". . . exceptions in penal statutes ought to be liberally construed in favor of him who is charged with the

violation of the provisions of the statute." 109 Pac. at 468.

In *State v. Cunningham,* 111 S.E. 835 (S.Ct. App. W.Va. 1922) the court was required to interpret a state penal statute known as the "Worthless Check Act." A proviso in the statute forbid prosecution if payment on the "worthless check" was made within twenty days from that on which the drawer "receives actual notice, verbal or written of the protest" of the check. Noting that a determination of the constituent elements of the offense created by the statute involved consideration of the proviso as well as its other parts, the court liberally interpreted the proviso explaining as follows:

> "The liberal construction here given to the proviso, in restraint of the operation of the terms of the main or penal clause of the statute, is well founded in authority. In its entirety, the statute is construed favorably to the accused, the penal part, strictly, and the exception or restraining clause, liberally." 111 S.E. at 837.

Additional support for *amici curiae's* contention herein is to be found in various texts analyzing the rules of statutory construction. For example, in Crawford, *Statutory Construction* (1940) the author discussing the general principle of strict construction of exceptions notes as follows at pages 610-611:

> "Where, however, a criminal or penal statute is involved, the exception must receive a liberal construction in favor of the defendant."

Similarly, discussing construction of a proviso, the author, first noting that "where the enacting clause is general in its language and purpose, a proviso subsequently following, should be construed strictly, and so as to exempt no cases from the enacting clause which does not fairly and clearly fall within its terms," concludes as follows:

> "This general rule, however, will not always be applied. For instance, the proviso will be given a liberal construction, and the main clause of the statute given a strict construction, in criminal cases, in favor of the accused." (pages 607-608)

To the same effect see McCaffrey, *Statutory Construction* (1953) § 59, p. 122.

In 50 Am. Jur., Statutes Section 431, p. 452, it is again recognized that in dealing with exceptions a rule of strict construction is not always applicable:

> "There are some cases, however, in which exceptions are liberally construed. The latter rule has been applied to statutes subject to a strict construction."

In 82 CJS Statutes, Section 382, p. 893, the rule is more specifically set forth as follows:

> "In some circumstances exceptions in a statute may be liberally construed to serve the general legislative policy. Exceptions in a statute imposing burdens are to be liberally construed in favor of the public; exemptions from provisions of statutes which impose restrictions on the use of private property are liberally

construed, and all doubts are resolved in favor of the property owner; and *exceptions in a penal statute are construed liberally in favor of a person charged with a violation of the statute.*" (Emphasis added)

Thus, it may be seen that the rationale underlying the general rule of strict construction of criminal statutes has been consistently applied to require a liberal construction of the terms of exceptions to criminal statutes, such as the Court is here dealing with, so as to resolve ambiguities therein in favor of inclusion within the exception, as is here urged.

B. A Determination By The Court That The Rule Requiring Liberal Construction of Exceptions To Criminal Statutes Is Applicable Herein Would Not Be Inconsistent With Any Decisions Of The Supreme Court Or Of This Court.

As noted in the preliminary statement, in adopting a rule of strict construction to be applied to interpretation of the terms of the exception here in question the District Court relied in part at least on the general rule that,

> " . . . exceptions in statutes must be strictly construed and limited to the objects fairly within their terms, since they are intended to restrain or accept that which would otherwise be within the scope of the general language." (Opinion of the District Court, p. 5, Record p. 79)

In support of the rule as stated the District Court cited two decisions of this Court, *Rheem Manufacturing Co.*

v. Rheem, 295 F.2d 473 (9th Cir. 1961) and *Korherr v. Bumb*, 262 F.2d 157 (9th Cir. 1958).

The District Court erred, we respectfully submit, in having failed to take proper cognizance of the fact that in the cited cases this Court was not dealing with statutes of a criminal nature but rather with remedial statutes to which the rule of strict construction of exceptions is applicable.* Indeed in *Korherr v. Bumb, supra,* this Court specifically emphasized in its opinion that it was dealing with enforcement of a remedial statute (a California state mechanic's lien statute, CCP § 1190.1) and that being remedial in nature it should be liberally construed and words of exception thereto strictly construed to limit the exception. 262 F.2d at 162.

In *Rheem Manufacturing Co. v. Rheem, supra,* this Court dealt with an exception to § 16(b) of the Securities Exchange Act of 1934, as amended, which is a wholly remedial provision of the Act. Section 16(b) provides a means whereby a corporation or stockholder thereof may institute civil action to recover from "insiders" (beneficial owners, directors or officers) any profits realized by such persons from any purchase and sale or any sale and purchase of any equity security within any period of

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* Remedial statutes are those which, according to one definition, ". . . afford a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries, and statutes intended for the correction of defects, mistakes and omissions in the civil institutions and the administration of the state." Sutherland, *Statutory Construction* (3rd ed.), §3302, p. 234-235.

less than six months. None of the criminal sanctions set forth in other portions of the Act are applicable to such transaction however, nor does the Act provide for any form of penalty over and above recovery of profits. Section 16(b) has been held to be a remedial provision. See *Smolowe v. Delendo Corp.*, 136 F.2d 231, 239 (2nd Cir. 1943).

In summary, decisions of this Court in *Rheem Manufacturing Co. v. Rheem, supra,* and *Korherr v. Bumb, supra,* in no way stand in the way of this Court's now adopting a rule of liberal construction when dealing with exceptions to criminal statutes.

The District Court in the instant case also relied on the decisions of the Supreme Court in *Arroyo v. United States,* 359 U.S. 419 (1959) and *United States v. Ryan,* 350 U.S. 299 (1956) in support of its decision to strictly construe the provisions of subsection (c)(5) of Section 302. Indeed the District Court apparently read those cases as *requiring* a strict construction of the welfare trust exemption. It is respectfully submitted that the District Court erred if it so read the cases.

For example, in *United States v. Ryan, supra,* the Court was not directly concerned with any of the exceptions to Section 302. Rather the Court was concerned with the definition of the term "representative" in Section 302(b) and it broadly construed the term as not being limited to "an exclusive bargaining representative" of employees, but as including any person authorized by the employees to act for them in dealings with their employers. The Court's conclusion was based upon its view of the

literal meaning of the term "any representative of any employees", as buttressed by consideration of the full text of Section 302, which in the view of the Court made it clear that Section 302 anticipated that a representative might be an individual. Furthermore, the Court's review of legislative history indicated to it that "a narrow reading of the term 'representative' would substantially defeat the congressional purpose." 350 U.S. at 304. Since both the wording of the statute and its legislative history *clearly* pointed to the definition of representative as adopted by the Court, there was obviously no need for nor did the Court in fact rule on any question regarding applicable rules of construction to a determination of the meaning of Section 302. Certainly the Court neither ruled nor intimated that the exceptions to Section 302 should be strictly construed since the exceptions were not directly involved in the case but were only referred to for the purpose of buttressing the Court's construction of the word "representative" as used in Section 302(b).

In *Arroyo v. United States, supra,* the Court did adopt a rule of strict construction in determining applicability of Section 302 to receipt and subsequent defalcation by a trustee of moneys paid by an employer "to a trust fund." The Court stated:

> "We construe a criminal statute. 'It is the legislature, not the Court, which is to define a crime, and ordain its punishment.' United States v. Wiltberger, 5 Wheat. 76, 95; United States v. Halseth, 342 U.S. 277; Krichman v. United States, 256 U.S. 363. We are mindful, of course, that, 'though penal laws are to be construed strictly, they are not to be construed

> so strictly as to defeat the obvious intention of the legislature.' United States v. Wiltberger, supra, at 95. As Mr. Justice Holmes put it, 'We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean.' Roschen v. Ward, 279 U.S. 337, 339." (359 U.S. at 424)

In holding that since the transaction was within the precise language of Section 302(c), i.e., paid to a trust fund, the act was not in violation of Section 302(b), the Court noted that "an examination of the legislative history confirms that a literal construction of the statute does no violence to common sense."

The fundamental error of the District Court in the present case was that of apparently interpreting the above quoted language of the Court as requiring a strict and literal construction of Section 302 in its entirety, whereas in fact the Court was again primarily concerned with the applicability of Section 302(b). The Court neither stated nor intimated that a strict and literal interpretation of the exceptions would be required. Indeed it was not concerned with the exception contained in Section 302(c)(5) except insofar as the legislative history underlying that section had bearing on the particular question of whether it was intended by Congress that defalcating trustees be held accountable under Section 302(b).

It is true of course that in the course of its discussion the Court did make specific comments about Section 302(c)(5) as follows:

> "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. . . . To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." 359 U.S. at 426.

It is submitted that in so stating the Court was not holding that in the event of ambiguity or uncertainty in interpretation of certain words in the exception, such as those here in question, that such uncertainty and ambiguity be dogmatically resolved by a literal, strict and perhaps unreasoned reading of the statute. Nor can such a holding or such reasoning in any way be imputed to any statement of the Court in *Arroyo* or elsewhere. The Court in *Arroyo* was fully cognizant of the fact that it was dealing with a criminal statute. Indeed it carefully heeded the appropriate rule of statutory construction in concluding that a strict and literal interpretation was in order in determining the applicability of Section 302(b) to the situation before it, thereby properly resolving the uncertainty in favor of the defendant and against finding a violation. Under such circumstances, it is inconceivable that the Court could be considered as having adopted a rule of strict construction to the exceptions to a criminal statute thereby resolving the uncertainty against the defendant and in favor of finding a violation.

It is in order to briefly comment upon a decision of this Court which may be brought into question. We do not read this Court's decision in *Local No. 2 v. Paramount Plastering, Inc.*, 310 F.2d 179 (9th Cir. 1962), affirming 195 F. Supp. 287 (S.D. Cal. 1961), cert. denied 372 U.S. 944 (1963), as in any way holding that, as a general rule of construction, the exceptions set forth in Section 302(c) are to be in all cases strictly and literally construed. This Court, adopting in large part Judge Yankwich's decision in the District Court did of course hold that ". . . *the only* trust funds permitted are those in the six categories now contained within the exceptions." and that ". . . until Congress has spelled out such an intent, with respect to the activities specifically exempted, it is not the function of the courts to create additional exceptions." 310 F.2d at 185-186. So holding this Court struck down as outside of the exceptions, trusts whose asserted purposes included such objectives as "promoting industry betterment and industry public relations, encouraging harmony between labor and management," etc. In our view even a very liberal construction of the exceptions to Section 302 would not have brought such trusts within the exceptions.* Accordingly, it cannot we think be said that this Court was in fact adopting a rule of strict construction to be applied to the meaning of terms contained within the exception. Indeed, application of the rule of strict or liberal construction would have been inappropriate where the mean-

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* The purposes of the trusts here in question are clearly those specified as appropriate in Section 302(c)(5) to wit: medical or hospital care and pension benefits.

ing of the statute was clear without resort to the rules. See *Osaka Shoshen Kaisha Line v. United States,* 300 U.S. 98, 101 (1937); *Ryan v. United States,* 278 F.2d 836, 838 (9th Cir. 1960).

On the other hand, if in the instant case the Court concludes that it is faced with the problem of interpreting the meaning of a statutory provision where the words of the statute do not clearly resolve the issue it will be appropriate for the Court to apply a rule of construction as an aid in reaching a decision. It is our contention that in view of the criminal character of the statute and the nature of the clause in question as constituting an exception, the adoption of a rule of liberal construction would be in order.

C. The Application of a Rule of Liberal Construction in Resolving the Dispute Herein in Favor of Participation of Retired Employees in the Medical-Hospitalization Trust and of Union Employees in Both the Medical-Hospitalization Trust and Pension Trust Would in No Way Defeat Any Purpose of Congress in Enacting Section 302.

A liberal construction in favor of inclusion within the exception would result in a holding that the word "employees" means former employees who have retired and that the words "other employers" includes union employers. Such a liberal construction would in no way defeat any of the purposes of Congress in enacting Section 302.

The broad purposes of Section 302 were aptly stated by Judge Learned Hand in his dissent in *United States v. Ryan,* 225 F.2d 417 (2d Cir. 1955), as follows:

> ". . . Congress wished to prevent employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers." (225 F. 2d at 426)

See also *United States v. Toth,* 333 F.2d 450, 453 (2d Cir. 1964); *Sanders v. Birthright,* 172 F. Supp. 895, 901 (S.D. Ind. 1959).

More specifically, insight into the purposes of Congress in enacting Section 302 may be gained from a review of the statements of its proponents immediately after the introduction of the amendment which is now Section 302 and during the course of the Senate debate which followed.

The amendment was introduced by Senator Ball who, at the time, described its purposes as follows:

> ". . . the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them, and that they shall not degenerate into bribes . . . ." (93 Cong. Rec. 4804; 2 NLRB, *Legislative History of the Labor Management Relations Act 1947,* p. 1305)

Senator Byrd, who had joined Senator Ball in introducing the Bill and who had been sponsor to an amendment of the so-called "Case Bill" (H.R. 4908) in 1946,

which was substantially identical to the proposed amendment, immediately supplemented Senator Ball's introductory remark, stating as follows:

> ". . . It [the Amendment] has a specific purpose, which is to prohibit the labor unions from requiring welfare funds to be paid into the treasuries of the labor unions. . ." (93 Cong. Rec. 4804; 2 NLRB, *Legislative History of the Labor Management Relations Act 1947*, p. 1305).

On the following day, May 8, 1947, Senator Taft, speaking on behalf of the amendment, went into a more detailed explanation of its provisions.* Explaining the main provision of subsection (5) containing the essential terms here in dispute ("for the sole and exclusive benefit of the employees of such employer and their families and dependents"), Senator Taft said:

> "In other words, this must be a trust fund. It cannot be the property of the union without a definite statement that it is in trust for the employees, who, after all have earned the money." (93 Cong. Rec. 4876; 2 NLRB, *Legislative History of the Labor Management Relations Act 1947*, p. 1311).

Senator Taft commented on subclause (B), which requires that the detailed payment basis on which payments

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* Although Senator Taft was not one of the four Senators who joined in introducing the amendment, he had previously joined Senator Ball and others in urging its introduction and adoption. See: Sen. Rep. 105 on S. 1126, Supplemental Views, p. 52; 1 NLRB, Legislative History of the Labor Management Relations Act 1947, p. 458.

are made is to be "specified in a written agreement with the employer":

> "The purpose of the amendment is to require that the fund shall be established in definite, detailed form, in the form of a trust fund, with respect to which the employees can determine their rights and can insist upon them." (93 Cong. Rec. 4877; 2 NLRB, *Legislative History of the Labor Management Relations Act 1947*, p. 1312).

Concluding his analysis of the amendment, Senator Taft commented upon the purpose of that part of subclause (B) requiring equal representation and provision for the appointment of neutral persons to break deadlocks, as follows:

> "The purpose is to prevent the abuse of welfare funds. . . .
>
> ". . .
>
> ". . . [U]nless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union, and that the employees for whose benefit it is supposed to be established, for certain definite welfare purposes, will have no legal rights and will not receive the kind of benefits to which they are entitled after such deductions from their wages." (Id.)

Finally, immediately prior to the Senate vote adopting the amendment, Senator Ball replied to critics as follows:

> "All that is sought to be done by the amendment is to protect the rights of employees. After all, on any

reasonable basis, payments by an employer to such a fund are in effect compensation to his employees. All that is sought to be done in the amendment is to see to it that the rights of employees in the fund are protected. . . ." (93 Cong. Rec. 4882; 2 NLRB, *Legislative History of the Labor Management Relations Act 1947*, p. 1321)

Thus, the basic purposes of the legislation were to prevent such funds from becoming "war chests" of unions or used by high union officials for their personal gain and to insure that such funds would be used for the direct benefit of employees and their families. Where a bona fide trust, jointly administered as required by Section 302, adequately specifies the types of permissible benefits and the conditions upon which such benefits are to be paid, there is no potential misuse or abuse merely because the term "employee" includes former employees, retired employees, union employees, trust employees or other employees. Similarly, there is no potential abuse or misuse merely because the term "employer" includes a union or the trust itself as well as other employers making contributions at the specified rate. It is submitted that by allowing the union to contribute as an employer would not defeat the congressional purpose of equalizing the representation of the trustees of the trust funds between union representatives and employer representatives because the trusts in question clearly prohibit the union as an employer from having any voice in the selection of the employer trustees. See Record, p. 10 and p. 26. A determination by this Court in accordance with the contentions herein urged will per-

mit the trust funds represented by *amici curiae,* typical of many others throughout the United States, to continue to provide specified benefits to thousands of former employees, retired employees, union employees and trust employees, all of whom are and have been relying on these trusts as a primary source of security.

It is submitted that Congress was not concerned with preventing the kind of conflict of interest between a union and the employees it represents as Judge Bonsal describes in *United States Trucking Corporation v. Strong,* No. 64-3716, ... F. Supp. ..... (S.D. N.Y. March 11, 1965) 58 LRRM 2778, when he states that to permit union employees to participate in trust fund benefits might cause a union to obtain less benefits for the employees it represents so as to pay less contributions for its own employees. Nowhere in the legislative history of Section 302 are there found any statements indicating that preventing such a possible conflict was a purpose of the legislation. It is submitted that such a possible conflict is too remote for Congress to have been concerned with. A union will represent thousands of employees and have very few employees itself. It is unrealistic to believe that a union would demand less benefits to the medical and hospital care and pension plans for the employees it represents in order to hold down the cost of providing such benefits to its own employees. No conflict with the legislative purposes can possibly be found from allowing a union employer to provide its employees with the same benefits obtained for the employees it represents. The only difference here is that to permit the union to contribute to the larger trust plans will allow it to obtain the

same benefits for its employees at a little lower cost than by a private plan.

Moreover, it is submitted that Congress was not intending to prevent employees from receiving medical or hospital care benefits after their employment status had terminated by retirement. Congress was intent on insuring that the funds would directly benefit employees. Certainly employees, whether present or former employees, will be directly benefited if as a result of their employment and contributions made by employers intended for their benefit, they are assured that after retirement, when earnings are reduced, their medical and hospital care expenses, which might greatly increase, will be substantially paid for.

A liberal construction of the words "employees" and "other employers" so as to permit union employees to receive medical-hospitalization and pension benefits from contributions by their union employer and retired employees to receive medical-hospitalization benefits from contributions made by employers for their benefit would in no way defeat any purpose of Congress in enacting Section 302.

CONCLUSION

For the reasons hereinabove stated, the judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES G. BAKALY, JR.